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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 137

THE V. L. SMITHERS MANUFACTURING COMPANY,
Petitioner,

vs.

WILLIAM P. O'BRIEN AND WILLIAM J. O'MALLEY,
D.B.A. ILLINOIS WHOLESALE FLORIST,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN REX ALLEN,
20 North Wacker Drive,
Chicago, Illinois 60606,
Attorney for Respondent.

Of Counsel:
JAMES R. SWEENEY,
HOFGREN, WEGNER, ALLEN, STELLMAN & MCCORD,
20 North Wacker Drive,
Chicago, Illinois 60606.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

There are no special or important reasons why certiorari should be granted in the present case. The Court of Appeals, from whose decision review is sought, correctly applied the well-established rule of law that a patentee having limited his claims in the Patent Office cannot take the position in court that his claims have a different and broader meaning. In arriving at this decision, the Court of Appeals relied on principles established by this Court in the case of *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 136-7 (1942) (A12).

The Question Here.

We cannot agree with the Petitioner as to Questions 1 and 2 (Petition p. 2). The canceled application claim lacked no element essential to the utility of the construction claimed. The patented claims include an element essential to confer patentability but not essential to utility. This element is stated in specific structure and not as means for performing a function so that the statute (35 USC 112) does not apply. The element is *not* included in the Defendant's structure either as such or in any equivalent form. Therefore, neither questions 1 nor 2 are properly before this court. On pages 8-9 hereof, we will state what we believe to be the only question in issue.

There is no reason for the Court to consider the third question. Where, as here, non-infringement is so clear there is no need to decide whether or not the patent is valid.

FACTS.

In its statement of the case, Petitioner has omitted some very important facts and has misstated others.

Difference in Manufacture.

The product which both the Petitioner and the Respondent sell is made from a mass or block of synthetic foam material consisting of thousands of cells, some open and some closed (36a-37a). The foam is formed in a large mass and then cut into smaller blocks (72a), the exterior surfaces of each block consisting of open and closed cells depending upon whether the cells were cut through when the block was made (51a). These blocks are then treated in an entirely different manner by each of the parties.

The foam is not only old, but it had been used before for

decorative and artistic flower arrangements (17a). It is hydrophobic as stated by the Petitioner. In order to make it hydrophilic, i.e., so that it will absorb water, the Smithers patent discloses spraying or dusting a layer of a wetting agent* on the exterior surfaces of the block for the following reasons:

> "The fact that the wetting agent is concentrated on the surface of the block and is carried into the block by the water, causes the concentration of the wetting agent to progressively diminish as the water is absorbed by the block. This action is very desirable because the concentrated wetting agent is not beneficial to the flowers, but as it is only in a very dilute solution in the interior of the block, any deleterious effects of the wetting agent are nullified.
>
> "An important advantage in coating the exterior of the foam with the wetting agent is that the dried layer of wetting agent will act as a binder over the exposed surface of the block, and this will prevent the objectionable dusting off of fine particles of the material in handling." (109a, Col. 4, lines 4-17.)

Every claim in the patent is limited to wetting agent located on the exterior of the mass of foam (110a).

Defendants' structure is a block of the same foam approximately 9" long, $4\frac{3}{4}$" wide and $3\frac{1}{8}$" deep. One face of the block, which is 9" x $4\frac{3}{8}$", has 272 holes, the diameter of each of which is not much bigger than the head of a common pin (74a), punched into it by needles. The District Court described the structure as follows:

> "The accused product is made from a phenolic resin foam of the same character as that used in Oasis. After the foam has set and dried, it is cut in blocks or masses of the desired size. These blocks or masses are placed upon a machine which injects one surface of the block

*Wetting agents are old, well known chemical substances which cause materials that repel water to accept it. A household detergent is one example of such a material (81a-85a).

with a large number of needles which penetrate the mass to within a short distance from the opposite surface thereof. After the points of the needles have penetrated within the interior of the mass, a liquid wetting agent is fed through the needles into the mass. The machine used is so designed that the feed of wetting agent through the needles ceases before the needles are withdrawn from the block of foam. The resulting product is a mass of foam having a large number of holes or openings upon one exterior face thereof with the wetting agent disposed therein." (A4-5.)

Obviously all of the wetting agent is inside the foam block. None is on the outside to draw water into the foam so that the concentration of the wetting agent progressively diminishes and none acts as a binder over the surface of the block to prevent the objectionable dusting off of fine particles of the material in handling, the reasons urged for granting the claims of the patent.

What Lower Courts Decided.

Contrary to what the Petitioner says the District Court found non-infringement because (1) the Respondents' structure does not meet the terms of the claims, i.e., it does not have a layer of wetting agent on the exterior of the mass of foam (A9-10) and (2) Petitioner was estopped to rely on the doctrine of equivalents to construe claims specifying wetting agent on the exterior of the foam as covering a construction where the wetting agent is in the interior of the foam (A10). The Court concluded as follows (A11):

"4. Before infringement can be found, the evidence must reveal that the placement of the elements of the accused material correspond to the claim of 'a layer of a wetting agent on the exterior of the mass adapted to carry water into the interior of the mass,' or that

the elements of the accused material are so arranged as to require application of the doctrine of equivalence. *Independent Pneumatic Tool Co.* v. *Chicago Pneumatic Tool Co.*, 7 Cir., 194 F. 2d 945, 947.

5. The doctrine of equivalence cannot be invoked by a patentee to recapture a monopoly which he disclaimed in order to obtain the grant of his patent. *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 136-7. *Taylor-Reed Corp.* v. *Mennen Food Products*, 7 Cir., 324 F. 2d 108. *Bauer* v. *Yetter Mfg. Co.*, D. C. Ill., 205 F. Supp. 904, 906, 909, aff'd 315 F. 2d 377."

The Court of Appeals agreed (A13).

History of Patent Application.

The original application, of which the patent in suit is a continuation-in-part, disclosed three ways of applying the wetting agent to the foam, namely (128a-9a):

1. ". . . spraying a concentrated solution . . . upon the surface of a block of foam."

2. A wetting agent in powdered form ". . . may be simply dusted upon the surface of the foam. . . ."

3. Immersing a block of foam in ". . . water containing a wetting agent."

There was no mention of any inoperative wetting agent being in the foam. The examples given were where the foam was either immersed in water to which the wetting agent had been added, or the foam was "treated" with a wetting agent and then immersed.

There were eight claims (130a). Claim 1 read as follows:

"As an article of manufacture, a synthetic organic foam and a wetting agent carried in the cells thereof."

Claim 2 read:

> "As an article of manufacture, a mass of foam of resinous plastic having interconnected cells and a wetting agent *carried in the cells opening on the surface of said mass.*" (Emphasis ours.)

Claims 3 to 7 all referred to the article of claim 2 or the method of making such article. Claim 8 called for the method of making the article by immersing the foam in water to which the wetting agent had been added.

The Patent Office rejected all of these claims as unpatentable over the prior art which disclosed the foam and wetting agents, because it was obvious to use a wetting agent to make a foam "wettable" and because the claims were broad enough to include materials which could not operate for the intended purpose (131a-2a).

In the amendment responding to this rejection the inventor added the following statement to the specification (133a):

> "When the wetting agent is applied to the surface of the foam it has been found that it binds the foam together and reduces the tendency of the surface of the foam to disintegrate as a fine dust on handling. A further advantage in applying the wetting agent to the exterior of the mass of foam is that when the foam is immersed in water the water, as it migrates to the interior of the foam, will carry the wetting agent with it in constantly decreasing concentration. Hence, the wetting agent in the interior of the foam will be diluted to such an extent as not to affect adversely flowers, the stems of which are embedded in the foam."

All of the original claims were then cancelled in this amendment and new claims were added, each of which called for applying a wetting agent to the exterior of the foam material (134a-5a). In contending that these new claims were allowable, the applicant argued (136a):

"When the wetting agent is applied *to the exterior* of the finished foam, the inherent resistance of the foam to penetration by water is overcome. In addition, the wetting agent acts as a binder preventing disintegration of the surface of the foam by attrition, and as the wetting agent is carried by the water *to the interior* of the foam, the wetting agent is diluted so that it does not cause premature wilting of the flowers.

The claims as redrafted call for the application of the wetting agent *to the exterior* of the foamed mass where it will be carried by water *into the interior* of the mass. These claims distinguish from the art of record." (Emphasis ours.)

Attached to this amendment was an affidavit of the inventor which further argued as follows (139a):

"A further advantage in coating *the exterior* of the foam, whether in block or shredded form, is to prevent the objectionable dusting off of the fine particles of the material in handling. The *dried outer coating* of the wetting agent *binds the surface* of the material together and prevents the disintegration of the surface of the foam.

A further advantage in applying the wetting agent *to the exterior* of the mass of foam is that when the foam is immersed in water, the water, as it migrates *to the interior* of the foam, will carry the wetting agent with it in constantly decreasing concentration. Hence, the wetting agent *in the interior* of the foam will be diluted to such an extent as not to affect adversely flowers, the stems of which are embedded in the foam." (Emphasis ours.)

The applicant also stated in this amendment (136a):

"It is true that various forms of wetting agents are used in the manufacture of foams made of synthetic resinous materials, as described in the prior art patents cited by the Examiner (Curs, Nelson, Brinkema and Wilson). Applicant himself uses a wetting agent ('Tween') in the manufacture of his phenol-formaldehyde foam which he sells to the floral trade, after treating it, under the trade name 'Oasis.'

> The purpose of adding a wetting agent to the phenol resin (or urea-formaldehyde) before foaming is to reduce the excessive brittleness of the foam and to impart to it a limited degree of softness and resilience. For some reason that is not clear, the wetting agent loses all of its properties as a wetting agent during the generation of the foam."

This was the first time that an inoperative wetting agent in the foam was ever mentioned. The wetting agent of the application itself (129a) was an active wetting agent. The original application was later abandoned and the patent in suit issued on a continuation-in-part application (107a-111a). This application described the inclusion of a wetting agent in the foam ingredients during manufacture to decrease its brittleness (108a) and stated that this wetting agent loses its wetting powers during such manufacture. This was obviously not the wetting agent of the original aplication (129a) and claims 1 and 8 thereof (130a).

The block of foam defined by the claims of the original application must be construed in the light of the disclosure and therefore it could only include an active wetting agent. This wetting agent served to wet the foam, i.e., draw water into it. It could not be inactive or inoperative as Petitioner would have this Court believe. Cancelled claim 1 therefore lacked no element essential to the utility of the claimed structure—but it lacked an element *essential* to patentability, i.e., the specific location of the wetting agent. The only reason the Smithers patent was granted was because the inventor convinced the Patent Office that it was new to locate the old and well-known wetting agent in a specific place, i.e., on the exterior of this foam, to get the advantages already discussed.

The real question presented therefore is whether a claim, which specifies a foamed mass having a layer of a wetting agent on the exterior surfaces thereof which will carry

water into the mass with a constantly decreasing concentration of the wetting agent and which will act to protect the exterior of the foam, is infringed by a block of foam which has wetting agent in the interior thereof and none on any exterior surface. There is no question of the doctrine of equivalents since in Respondent's product the wetting agent being within the foam cannot decrease in concentration as the water enters and cannot protect the exterior. Respondent's wetting agent location is not equivalent therefore in any way to the location claimed in the Smither's patent. To so extend the claim language would make it cover the structure of cancelled application claim 1 which did not define the location of the wetting agent in the foam. The real question was answered by the District Court and the Court of Appeals in the negative. They also correctly held the doctrine of equivalents was not available. Non-infringement was so clear that neither Court found it necessary to go into the matter of the validity of the patent.

There Is No Conflict With Other Circuits on the Doctrine of Equivalents.

In *I. T. S. Rubber Company* v. *Essex Rubber Company*, 272 U. S. 429 (1926) this Court said at page 443:

> "It is well settled that where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. *Shepard* v. *Carrigan*, 116 U. S. 593, 597. If dissatisfied with the rejection he should pursue his remedy by appeal; and where, in order to get his patent, he accepts one with a narrower claim, he is bound by it. *Shepard* v. *Carrigan, supra*, 597; *Hubbell* v. *United States*, 179 U. S. 77, 83. Whether the examiner was right or wrong in rejecting the orig-

inal claim, the court is not to inquire. *Hubbell* v. *United States, supra,* 83. The applicant having limited his claim by amendment and accepted a patent, brings himself within the rules that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers. *Sargent* v. *Hall Safe & Lock Co.,* 114 U. S. 63, 86; *Shepard* v. *Carrigan, supra,* 598; *Hubbell* v. *United States, supra,* 85. The patentee is thereafter estopped to claim the benefit of his rejected claim or such a construction of his amended claim as would be equivalent thereto. *Morgan Envelope Co.* v. *Albany Paper Co.,* 152 U. S. 425, 429. So where an applicant whose claim is rejected on reference to a prior patent, without objection or appeal, voluntarily restricts himself by an amendment of his claim to a specific structure, having thus narrowed his claim in order to obtain a patent, he 'may not by construction, or by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments which amount to a disclaimer.' *Weber Elec. Co.* v. *Freeman Elec. Co.,* 256 U. S. 668, 677."

Applying this rule to the present case we find that the original claim which the patentee filed called for a block of foam with a wetting agent in the cells thereof, i.e., the cells on the exterior surface as well as in the interior of the block. For reasons referred to on pages 5 to 8 hereof, the patentee limited his claims to a block having a wetting agent on the exterior surfaces only. Whether or not the prior art required him so to do is unimportant. The fact is that the Examiner rejected claims which did not specify the location of the wetting agent on the exterior surfaces of the block and accepted claims where the location was specified. As this Court stated, "Whether the examiner was right or wrong in rejecting the original claim, the court is not to inquire."

It should be noted, however, that the Examiner was right. During the prosecution of the original application the Examiner rejected the claims because "It would appear obvious to use a wetting agent to make a foam 'wettable'" (132a). In responding to this rejection the applicant stated "We do not agree that it is obvious or without invention to coat the exterior of a block of foam made of these synthetic resins with a wetting agent" (137a). In other words, the inventor argued that it was not obvious to put the wetting agent on the outside of the block. He did not argue that it was invention for the wetting agent to be "carried in the cells" of the foam.

The facts here are analogous to those in *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126 (1942), which decision is controlling here. In that case the Supreme Court said at page 136:

> "Whatever may be the appropriate scope and application of the doctrine of equivalents, where a claim is allowed without a restrictive amendment, it has long been settled that recourse may not be had to that doctrine to recapture claims which the patentee has surrendered by amendment.
>
> "Assuming that the patentee would have been entitled to equivalents embracing the accused devices had he originally claimed *a 'conductor means embedded in the table,'* a very different issue is presented when the applicant in order to meet objections in the Patent Office, based on references to the prior art, adopted the phrase as a substitute for the broader one *'carried by the table.'* Had Claim 7 been allowed in its original form it would have read upon all the accused devices since in all the conductor means complementary to the coil spring are 'carried by the table.' By striking that phrase from the claim and substituting for it 'embedded in the table' the applicant restricted his claim to those combinations in which the conductor means, though carried on the table, is also embedded in it. By the amendment he recognized and emphasized

the difference between the two phrases and proclaimed his abandonment of all that is embraced in that difference. *Hubbell* v. *United States,* 179 U. S. 77, 83, 45 L. ed. 95, 99, 21 S. Ct. 24; *Weber Electric Co.* v. *E. H. Freeman Electric Co.,* 256 U. S. 668, 677, 678, 65 L. ed. 1162, 1167, 1168, 41 S. Ct. 600; *I. T. S. Rubber Co.* v. *Essex Rubber Co.,* 272 U. S. 429, 440, 444, 71 L. ed. 335, 341, 343, 47 S. Ct. 136; *Smith* v. *Magic City Kennel Club,* 282 U. S. 784, 789, 75 L. ed. 707, 712, 51 S. Ct. 291; *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 311 U. S. 211, 85 L. ed. 132, 61 S. Ct. 235, cf. in case of disclaimer *Altoona Publix Theatres* v. *American Tri-Ergon Corp.,* 294 U. S. 477, 492, 493, 79 L. ed. 1005, 1015, 1016, 55 S. Ct. 455. The difference which he thus disclaimed must be regarded as material, and since the amendment operates as a disclaimer of that difference *it must be strictly construed against him. Smith* v. *Magic City Kennel Club, supra* (282 U. S. 790, 75 L. ed. 712, 51 S. Ct. 291); *Shepard* v. *Carrigan,* 116 U. S. 593, 598, 29 L. ed. 723, 724, 6 S. Ct. 493; *Goodyear Dental Vulcanite Co.* v. *Davis,* 102 U. S. 222, 228, 26 L. ed. 149, 151. As the question is one of construction of the claim it is immaterial whether the examiner was right or wrong in rejecting the claim as filed. *Hubbell* v. *United States, supra* (179 U. S. 83, 45 L. ed. 99, 21 S. Ct. 24); *I. T. S. Rubber Co.* v. *Essex Rubber Co., supra* (272 U. S. 443, 71 L. ed. 342, 47 S. Ct. 136). It follows that what the patentee, by a strict construction of the claim, has disclaimed—conductors which are carried by the table but not embedded in it—cannot now be regained by recourse to the doctrine of equivalents, which at most operates, by liberal construction, to secure to the inventor the full benefits, not disclaimed, of the claims allowed." (Emphasis added.)

Claims for a block of foam with a wetting agent carried in the cells of the foam and claims to a block with the wetting agent on the exterior thereof are just as different as the claims in the above case and the resulting disclaimer just as clear.

Two of the cases on which the Petitioner relies as being contrary to the decision of the District Court and Court of Appeals in the present case have no pertinency whatsoever. In *Musher Foundation, Inc.* v. *Alba Trading Co., Inc.*, 150 F. 2d 885 (C. A. 2, 1945) the claims had been allowed but were later cancelled for reasons not of record. The Court said (p. 888) that under such circumstances the remaining claim was "entitled to the same range of equivalents as though the three claims had not been cancelled". In *New York Scaffolding Co.* v. *Whitney*, 224 Fed. 452 (C. A. 8, 1915), the claims had not been cancelled but had been persisted in and eventually allowed. The part of the decision quoted by Petitioner is pure dictum. In the other cases cited the patentee had not limited his claims to a specific structure as was done by the patentee in the present case. There is, therefore, no conflict with any other decision.

No Conflict With Statute.

The argument of Petitioner with respect to conflict with the statute is not understood. The statute reads as follows:

> "An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof." (35 U. S. C. 112, par. 3.)

Not a single one of the claims in the patent in suit includes the word "means". They recite specific structure. How there can be any conflict with the statute is beyond comprehension.

VALIDITY.

There can be no question but that this Court in *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327 (1945), said that it would usually be the better practice to decide validity after a trial of a patent infringement action. This has never, however, been interpreted as being an absolute requirement where, as in the present case, lack of infringement is so clear. For example, in *Coe Mfg. Co.* v. *Jeddeloh Bros.*, 306 F. 2d 455 (1962), the Court of Appeals for the Ninth Circuit said (p. 456):

> "the question of infringement of the claims in issue is a close one, at least with regard to Claim 17. At all events, non-infringement is not readily apparent or perfectly clear; hence, the question of the validity of the claims should have been determined by the trial court."

There has been no holding by this Court or by any Court of Appeals that where the fact of non-infringement is clear, a holding as to the validity of the patent is necessary.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

JOHN REX ALLEN,
Attorney for Respondent.

Of Counsel:
JAMES R. SWEENEY,
HOFGREN, WEGNER, ALLEN, STELLMAN & MCCORD,
20 North Wacker Drive,
Chicago, Illinois 60606.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

H. F. McNENNY,
920 Midland Building,
Cleveland, Ohio 44115,
Attorney for Petitioner.

McNENNY, FARRINGTON, PEARNE & GORDON,
Cleveland, Ohio,

SOURS, NEWELL & NICOL,
Peoria, Illinois,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

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OCTOBER TERM, 1964.

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REPLY BRIEF OF PETITIONER.

The Accused Foam Has Exterior Layers Recessed Into the Blocks.

Respondents' description of the manufacture of the accused material (R. B. 2-4)* stops with the injection of the *solution* of wetting agent into the perforations in the block. There is no dispute in the evidence that thereafter the wetting agent solution dries by evaporation of the water, forming dried layers of wetting agent on the surfaces of the holes, which layers are positioned to contact water when the mass of foam is immersed in water, and which then act to draw the water into the interior of the mass of foam (A 7).

* Pages of Respondents' brief are referred to as "R.B." ; pages of Petitioner's Appendix filed in the Court below are referred to as (a); pages of the Appendix annexed to the Petition are referred to as (A).